# No. 6876

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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TIMOTEO ANGCO and CIPRIANO ANGCO (minors), by VICTOR FERIL ANGCO, their uncle and next friend,

*Appellants,*

vs.

THE STANDARD OIL COMPANY OF CALIFORNIA (a corporation),

*Appellee.*

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## BRIEF FOR APPELLEE.

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## BRIEF FOR APPELLEE.

### I.

### FOREWORD.

It is with great regret that we find that we cannot agree with appellants' "Statement of the Facts" and with a great many statements, as of fact, made in the body of their brief. It would have greatly reduced our labors—and have assisted the Court—if counsel had confined their statements to matters supported by the record. Fortunately, the transcript of the proceedings in the trial Court is short and the Court can check very quickly the glaring discrepancies between appellants' statements and the record facts, which are set forth on pages 68 to 75, inclusive, of the transcript.

At the conclusion of the testimony, defendant moved for a directed verdict. (Trans. pp. 75-6.) Before the motion was acted upon, plaintiffs moved to reopen the case. The proceedings upon the latter motion will be found on pages 76 to 81, inclusive, of the transcript. This motion was denied and a verdict was directed in favor of defendant. (Trans. p. 81.)

Appellants' brief does not contain a specification of the errors relied upon, as required by Rule 24 of this Court.

The argument on various matters is so intermingled that it is difficult to determine upon which of the assignments of error contained in the transcript appellants do rely, and no reference is made to any of them.

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## II.

### STATEMENT OF THE CASE.

On June 16, 1930, defendant's steamship "Lubrico" was anchored at Kahului, Island of Maui. Mr. Daniels was captain of the vessel and Mr. Warner was her chief engineer. Between 2:30 and 3:00 o'clock in the afternoon, Mr. Warner left the vessel, on a pleasure trip, to play golf with a Mr. Burns, an agent of the defendant, who resided at Paia—a distance of about eight miles from Kahului. Before leaving the vessel, Mr. Warner asked the chief officer when he would be ready to sail and the latter said "between 9 and 11".

In the evening (the exact time does not appear in the record, but in a statement to the trial Court *plain-*

*tiffs'* counsel said it was *6:30*) (Trans. p. 78), Mr. Warner took an automobile belonging to defendant, and used by Mr. Burns, from Mr. Burns' garage at Paia and, with Captain Daniels accompanying him, proceeded to drive toward Kahului. While enroute, the car was driven by Warner against a parked truck which was faced toward Kahului and Felix Angco and another Philipino were killed. "The accident occurred *between the hours of seven and eight o'clock P. M.*" (Trans. p. 70.)

The plaintiffs called Mr. Warner as their witness and the only evidence in the record with respect to the purpose of his time ashore and his return trip to Kahului is contained in his testimony, which is uncontradicted. He testified he and Captain Daniels were going to the steamship "Lubrico" but expected first to stop and eat in Kahului (Trans. p. 73); that his duties on the boat were the usual duties of a chief engineer of a steamship, and that the boat would go to sea under the command of Captain Daniels "from the outside of Kahului harbor". (Trans. p. 73.)

He further testified that "he had no duties on shore at Kahului on the night or afternoon of June 16, 1930; that at the time he was driving the automobile he had not come from performing any duties for the Standard Oil Company and at the time he was driving the car he was not performing any duties for said company; that he was driving down to have a sandwich before going on the boat". (Trans. p. 74.)

The trial Court questioned Mr. Warner very minutely as to his actions and purposes and we believe

that, as the answers given the trial Court go to the vitals of this case, it will be of assistance to this Court to quote the questions and answers, verbatim, as they appear on pages 74 and 75 of the transcript. We now do so:

"The Court. The court would like to ask a question in view of the line of examination taken, in anticipation of being called upon to make rulings in the matter. When you went ashore did you go ashore in connection with being under orders from anybody having a right to give you orders, or were you on shore that night?

A. Whenever I go on shore I can go as I please.

The Court. Did anyone order you to go ashore in connection with the boat?

A. No.

The Court. In connection with driving the automobile that night did anyone give you any orders in connection with driving the car?

A. No.

The Court. Did anyone give you any orders as to where you should go?

A. No.

The Court. At the time of the accident were you under orders of any superior, orders of anyone on the boat?

A. No, I just asked him if he wanted to eat.

The Court. At the time you got in the car to go back to the boat the captain was with you?

A. Yes.

The Court. Did the captain give you any orders as to returning to the boat and resuming your duties at that particular time?

A. No, sir.

The Court. Were you performing any task or errand on behalf of the captain?

A. No, sir.

The Court. When did you leave the 'Lubrico' to come ashore?

A. Between 2:30 and 3 o'clock.

The Court. At that time were you on any errand connected with the boat?

A. No, sir.

The Court. Were you in company with the captain under his orders to accompany him?

A. No, sir, I went there mostly with Mr. Burns to play golf.

The Court. A pleasure trip?

A. Yes.

The Court. When were you due back on the boat?

A. I asked the chief officer when he would be ready to go and he said between 9 and 11, so I thought to get back about 7:30."

In response to questions of plaintiffs' counsel, Mr. Warner testified that it was his "duty to be back on the boat in time to sail". (Trans. p. 75.)

While we shall discuss hereafter some of the misstatements contained in appellants' brief, we desire to call the Court's attention to some of them at this point. They open their brief (page 1), with the statement that the accident occurred "at *eight* o'clock" and that "Mr. Warner was *due* back on his boat at about seven-thirty". This appears—in the light of the record—to be a deliberate attempt to mislead the Court into the belief that Mr. Warner was already overdue upon the ship and that an emergency had

arisen demanding the use of defendant's automobile. There is not a scintilla of evidence in the record to support such contention.

The *only* evidence is that the accident occurred "between the hours of seven and eight o'clock P. M." (Trans. p. 70) while Mr. Warner testified that he "*thought* to get back *about* 7:30". (Trans. p. 70.) As shown above, Mr. Ulrich, plaintiffs' counsel, elicited the testimony that it was his "*duty to be on the boat in time to sail*". (Trans. p. 75.) The sailing time was "between 9 and 11". (Trans. p. 75.) With only eight miles to travel (Mr. Ulrich said it was approximately five miles; Trans. p. 78), it was obviously a trip of only 10 to 20 minutes by automobile. The two men could easily have walked from Paia to Kahului and have arrived considerably before 9 o'clock—the *earliest* hour of sailing.

Here is a statement quoted from page 3 of appellants' brief, *not one* allegation of which is supported by the record, excepting the statement that the trial judge ruled that the chief engineer and the captain were using the car solely for their personal benefit:

> "Conditions on the island of Maui, differ materially from those of the complex communities on the mainland of the United States. There is no trolley system on the island of Maui. There is a railroad system which never runs on Sunday, nor on any day between Paia and Kahului at the time at which the Captain and Engineer of the 'Lubrico', found themselves at Paia when they should have been on their boat getting it ready to sail. The only means of transportation available between Paia and Kahului was by automobile,

> and certainly the General Manager, C. D. Burns, did not think, when he authorized them to use the Company car to go down to the harbor with all dispatch, that he was doing something that was not for the benefit of the Company, but was solely for the personal benefit of the Captain and the Engineer, as the trial judge ruled."

Similar misstatements are sprinkled through the brief, counsel displaying an utter disregard for the evidence disclosed by the record.

There is no statement whatever in the appellants' "Statement of Evidence" that defendant ever authorized Mr. Burns to allow the "Lubrico's" officers to use the automobile or that Mr. Burns authorized the use of it. In fact, plaintiffs' witness Cummings testified that "they (presumably the boat's officers) told me they *took* the car from Mr. Burns' garage." (Trans. p. 70.)

Yet, throughout their brief, counsel boldly state that Burns authorized the officers to use the car. It would not alter the result in this case if the record did show authority to and from Burns, for the plaintiffs' uncontradicted evidence is that Mr. Warner went ashore for the purpose of playing golf and that he had no duty whatsoever to perform for defendant while ashore. Incidentally, since Warner was the vessel's chief engineer, it would appear quite obvious that his employment would be confined to the vessel. Marine engines are not operated or repaired upon golf courses.

## III.

### POINTS TO BE PRESENTED IN THIS BRIEF.

There being no assignment of errors in appellants' brief and the contentions of counsel not being arranged in logical order or with reference to any assignment of error set forth in the transcript, it is difficult to put our reply in orderly sequence. However, we shall discuss the case under the following points:

1. The denial of plaintiffs' motion to reopen the case after the testimony had been closed and defendant had moved for a directed verdict was a proper exercise of discretion by the trial Court.

2. The evidence which plaintiffs proposed to offer if the motion to reopen had been granted does not affect the propriety of the trial Court's action in directing a verdict; it can be considered only in connection with the denial of the motion to reopen.

3. It is the duty of a trial Court to direct a verdict for defendant where there is no substantial evidence to support the allegations of plaintiff's complaint.

4. The evidence in this case showing, without contradiction, that Warner was using the car for his own purposes and not at all in the course of his employment by defendant, there was a total failure of proof. Assuming the inference from defendant's ownership and from its employee's driving the car that it was being used on defendant's business, such inference was wholly destroyed by plaintiffs' introduction of Warner's testimony.

5. Plaintiffs did not stand upon the inference, but produced Warner as their witness, did not attempt to impeach him, and are bound by his testimony.

6. Appellants' violation of Rule 24 of this Court's rules and insufficient assignments of error.

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## IV.

### THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO REOPEN.

Plaintiffs' complaint alleged that "Warner was an employee or agent of said defendant" and that "Warner, while driving a certain automobile *on business for defendant, and while acting within the scope of his employment*" negligently drove said automobile. (Trans. p. 3.)

Counsel upon making his motion to reopen was asked by the Court what evidence he desired to introduce. He said he wanted to prove "*by Mr. Burns* that he did authorize Mr. Warner to take the car for the purpose of driving himself and the captain down to *resume* their duties on the boat". (Trans. p. 76.) (The Court will note that counsel impliedly admitted Warner would not be on any duty until he reached the boat.)

Counsel also stated that he wanted to prove that Mr. Burns was an agent with general authority, and "to show facts which will present a question to the jury as to whether there was an emergency". In response to the Court's question as to what facts he intended to present, the following colloquy occurred:

"Mr. Ulrich. The fact that it was 6:30 in the evening; the fact that the boat was leaving that night, as they understood at the time, between 9 and 10 or 11 o'clock; the fact there were duties for the captain and engineer to perform on the boat before the boat left; the fact that they were at a distance, several miles——

The Court. More than five miles?

Mr. Ulrich. I don't know.

Mr. Pittman. I think about five miles.

The Court. The witnesses placed the scene of the accident between two and three miles from Paia.

Mr. Ulrich. They were at the Burns' home when they took the car. I think we can say at least five miles, or approximately that, from the boat.

The Court. Were telephones accessible?

Mr. Ulrich. I don't know what the evidence would show.

The Court. What do you think the evidence would show?

Mr. Ulrich. I don't propose to show that there might have been other ways of getting them down. In other words, I am not suggesting I will be able to prove this is the only way they could have gotten to the boat, but I do suggest it is a reasonable way." (Trans. p. 78.)

Defendant's counsel stated in open Court:

"We had Mr. Burns down from Maui" (the trial was in Honolulu) "at the request of plaintiffs' counsel ready to answer any questions they wanted to ask him, and he went home yesterday afternoon, because he has to get his accounts out for this month." (Trans. p. 77.)

This statement was not denied by plaintiff's counsel.

Because it is difficult to put it in narrative form, we shall quote substantially all of the further proceedings upon the motion (Trans. pp. 79-81):

"The Court. The Court will permit you to do this, to go and interview Mr. Burns, accompanied by counsel for the defendant.

Mr. Wild. He went home last night.

The Court. I understand from the facts disclosed that the man concerned, Mr. Burns, has been in attendance on the Court and has gone back to his employment on Maui.

Mr. Ulrich. We have a record of the testimony, so far as the lending of the car is concerned, taken at the other trials, and so far as his duties are concerned, we can call another officer of the Standard Oil Company.

The Court. With Burns missing and absent without any fault on the part of the defendant, what witness are you intending to offer?

Mr. Ulrich. I should call the Captain. I have the testimony.

The Court. Let's see the testimony.

Mr. Ulrich. As to the scope of the employment I would have to call some officer of the Standard Oil Company here.

The Court. Who?

Mr. Ulrich. Whoever is the representative of the Standard Oil Company.

The Court. The Court will permit you to go with counsel for the defendant and find that officer and check up on the matter. Anybody here whom Mr. Ulrich wants to interview?

Mr. Pittman. I will go down and bring you up an officer.

Mr. Wild. We have no objection to his interviewing any official of the company he wishes. Mr. Campbell I think would be the one.

Mr. Ulrich. I don't offer to prove that he has any control over the boats. My offer was to prove that he might take such steps and do such things as might be necessary to expedite the movement of the company's boats.

Mr. Wild. Well, he has nothing of that kind to do.

The Court. Do I understand, Mr. Ulrich, that your request for reopening concerns any effort to prove that Mr. Burns had any supervision over the crew or employees on the boats of the Standard Oil Company?

Mr. Ulrich. No.

The Court. I understand you do not intend to show that he had any general control or supervision of the boats?

Mr. Ulrich. No.

The Court. *Do you intend to show that he was requested* to give any orders in supervision or control over the persons or the boats?

Mr. Ulrich. I do not intend to show he had any control over the movements of the men.

The Court. Do I understand that your offer means to prove that Mr. Burns in his office as an official of the company was requested to use the company's automobile for any other purpose than the conveyance of the captain and the engineer in returning from their holiday to their duties on the boat?

Mr. Ulrich. In this particular instance he authorized the use of the automobile for the company's purposes in getting the men back to the boat.

The Court. Was there any other company's business of any kind connected with your offer of proof that Mr. Burns was requested or concerned with furthering than the matter, whatever inference may be drawn from it, of assisting these two men in returning to the boat?

Mr. Ulrich. That's all.

Mr. Wild. From the offer of proof, as it now appears, it would not change the Court's ruling, and counsel has in everything he contends to be a fact.

Mr. Ulrich. If it will be admitted, as a matter of record, that Mr. Burns authorized the use of this car for the purpose of getting the men back to the boat, and further admitted that Mr. Burns is a representative of the Standard Oil Company on Maui.

The Court. I understand the extent of opposing counsel's admission is that Mr. Burns is distributing and sales manager of the Standard Oil Company products on the Island of Maui, having no supervision or control over the movement of the boats.

Mr. Wild. That is an accurate statement.

The Court. And automobile in question, Mr. Burns was under no orders or requests on company business other than could be inferred by your argument that the return of the men from their holiday in some way benefited and expedited the company's affairs as to the boat.

Mr. Wild. We will admit that.

The Court. Well, then it is not necessary to take the offer, and I deny the motion.

Mr. Ulrich. Exception to the denial of the Court to reopen."

It is obvious that the Court properly refused permission to reopen to call Mr. Burns as a witness when it appeared that he had come over from the Island of Maui to Honolulu at the request of plaintiffs' counsel, had remained in atendance at the Court, had not been called and had, therefore, returned to Maui.

When counsel was offered an opportunity to interview an officer of the defendant, he did not accept the offer but, instead, admitted that he did not expect to prove that Mr. Burns had any control over the movements of the men employed upon defendant's boats or any general control or supervision over the boats. He finally admitted, in substance, that all he could hope to prove was that Mr. Burns wanted to assist the two men in returning to the boat. Quite a natural attitude, we assume, for one golf player to assume toward another—his guest.

In view of the allegations of the complaint, of the fact that there had been a criminal trial with which counsel were apparently familiar, of the fact that Mr. Burns had been in attendance upon Court at the request of plaintiffs' counsel, and of the fact that when offered permission to interview defendant's officers, they did not accept the offer, it would have been an abuse of discretion if the Court had permitted the reopening of the case after both sides had rested and defendant had moved for a directed verdict.

The granting or refusal of a motion to reopen is peculiarly in the discretion of the trial Court and an Appellate Court will not interfere except in a clear case of abuse of discretion.

*Loftus v. Fischer,* 113 Cal. 286, at 289:

"So, too, it was not error for the court, after the case had been closed, to refuse to open it for the taking of further evidence. No showing is made that it had but newly come to the knowledge of plaintiff, and indeed, as the offered evidence was a part of defendant's answer in another action between the same parties, it is at least presumable that its existence and materiality were known to plaintiff all the time."

Apropos of the situation presented by our record, we quote from the opinion of the Circuit Court of Appeals for the Second Circuit in *Goddard v. Crefield Mills,* 75 Fed. 818, at 820:

"Thereupon, the case being finally closed by both sides, defendants recalled the witness Pope, whom they had once examined, and offered to show by him 'what would be a reasonable time'. The record contains no excuse for this belated tender of evidence, which defendants had had abundant opportunity to introduce in its proper place, and the court quite rightly refused to open the case to let it in."

There, as here, no excuse was offered for the belated tender of evidence.

*The Philadelphia and Trenton Railroad Company v. Stimpson,* 14 Peters 448, 10 L. Ed. 535, at 543:

"The next and last exception is to the rejection of the evidence of Dr. Jones, who was offered to prove that there were material differences between the patent of 1831, and the renewed patent of 1835, and to explain these differences. *No doubt*

*can be entertained that the testimony thus offered was, or might be, most material to the merits of the defense.* And the question is not as to the competency or relevancy of the evidence, but as to the propriety of its being admitted at the time when it was offered. It appears that the testimony was not offered by the defendants, or stated by them as a matter of defense, in the stage of the cause when it is usually introduced according to the practice of the court. It was offered after the defendants' counsel had stated in open court that they had closed their evidence, and after the plaintiff, in consequence of that declaration, had discharged his own witnesses. The question, then, is, whether it was at that time admissible on the part of the defendants as a matter of right; or whether its admission was a matter resting in the sound discretion of the court. If the latter, then it is manifest that the rejection of it cannot be assigned as error.

* * * * * * *

It seems to us, therefore, that all courts ought to be, as indeed they generally are, invested with a large discretion on this subject, to prevent the most mischievous consequences in the administration of justice to suitors; and we think that the circuit courts possess this discretion in as ample a manner as other judicial tribunals. We do not feel at liberty, therefore, to interfere with the exercise of this discretion; and, indeed, if we were called upon to say upon the present record, whether this discretion was, in fact, misapplied or not, we should be prepared to say that we see no reason to doubt that it was, under all the circumstances, wisely and properly exercised. *It is sufficient for us, however, that it was a matter*

*of discretion and practice, in respect to which we possess no authority to revise the decision of the Circuit Court.*" (Italics ours.)

To the same effect are:

38 *Cyc.* 1364-1366;

*Postal Telegraph Company v. Northern Pacific Railway Company* (C. C. A., 9th), 211 Fed. 824;

*Zanone v. Oceanic Steam Nav. Co.* (C. C. A., 2nd), 177 Fed. 912.

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## V.

**THE EVIDENCE WHICH PLAINTIFFS PROPOSED TO INTRODUCE IF THE MOTION TO REOPEN HAD BEEN GRANTED IS MATERIAL ONLY IN DETERMINING THE PROPRIETY OF DENYING THE MOTION; IT IS NOT GERMANE TO THE QUESTION AS TO WHETHER OR NOT THE COURT SHOULD HAVE DIRECTED A VERDICT FOR DEFENDANT.**

The appellants' "Statement of Facts" recites that the testimony had been concluded and the motion for directed verdict had been made, before plaintiffs moved to reopen or intimated that they desired to offer other testimony. (Trans. pp. 75-6.)

Counsel state (page 12) that on motions for nonsuit or directed verdict "all the evidence adduced or *offered* by the plaintiff is considered as true." We grant that all *adduced* is considered as true—which is one reason for the giving of the directed verdict in this case, as no other action could possibly have been taken in view of testimony of Mr. Warner, adduced by plaintiff.

But counsel make no argument and cite no authority for the statement that any *offered* testimony must be considered as true. It should be evident to counsel that only matters before the Court when the motion was made can be considered in determining whether or not it was properly granted. If evidence had been offered and excluded before the parties had rested, the error, if any, would be tested, not upon the validity of the direction of the verdict, but upon the error, if any, in the exclusion of evidence.

In passing, we note that counsel—quite properly—took his "exception to the denial of the Court to reopen" (Trans. p. 81), and *did not except to any refusal of offer of proof.*

There can be no question that excluded evidence cannot be considered except in connection with error in the ruling upon it—it forms no part of the record in the case for any other purpose.

> 1 *Hayne, New Trial and Appeal* (Revised Edition), page 542:
>
> "Excluded evidence will not be considered by the appellate court in reviewing the sufficiency of the evidence to support the findings."

> *Shepherd v. Turner,* 129 Cal. 530, at 532:
>
> "We know of no rule that would authorize us in any way to consider 'excluded evidence' in reviewing the sufficiency of the evidence as to a question of fact decided by the lower court. The only evidence we have any power to consider in such case is the evidence in the record, and not such as might be there. If the court rejects competent evidence, the proper exception is saved to

the ruling, this court will review the ruling, and if prejudicial error appears reverse the case."

*Collins v. Hoffman,* 62 Wash. 278, 113 Pac. 625, syllabus:

"Where instruments are in the record on appeal only as identified offers of proof and not properly identified so as to admit them as evidence, because the trial court excluded them as privileged communications, the court on appeal may not accept and review them as evidence, but is limited to determining the question of their admissibility."

To the same effect:

*Ewart Lumber Co. v. American Cement Plaster Co.,* 62 So. 560 (Ala.);

*Schultz Construction Co. v. Lovett,* 24 S. W. (2d) 330 (Ark.);

*Schworm v. Fraternal Bankers' Reserve Society,* 150 N. W. 714 (Iowa);

*Eagle Lumber & Supply Co. v. De Weese, et al.,* 135 So. 490 (Miss.);

*O'Dell v. National Lead Co.,* 253 S. W. 397 (Mo.);

*Dolan v. Continental Casualty Co.,* 281 Pac. 182 (Ore.);

*Brazelton-Johnson v. Campbell,* 108 S. W. 770 (Tex.);

*Hirsh v. Ogden Furniture & Carpet Co.,* 160 Pac. 283 (Utah);

*Hill, et ux. v. Scott,* 143 Atl. 276 (Vt.);

*Carter Oil Co. v. Pacific-Wyoming Oil Co. et al.,* 263 Pac. 960 (Wyo.);

*Pfeffenback v. Lakeshore & M. S. Ry.,* 41 N. E. 530 (Ind.);

*Chicago, etc. Traction Co. v. Gervens,* 113 Ill. App. 275;

*Yezner v. Roberts, etc. Co.,* 140 Ill. App. 61.

As a matter of fact, there was never made an offer of proof in accordance with the requirements of law. Plaintiffs did make a motion to reopen and, in connection with that motion to reopen, they stated their desire to produce certain persons and to prove certain things, but at that time the testimony had been closed, they had no witness on the stand, and were not in position to make a valid offer of proof.

*Chicago City Ry. Co. v. Carroll,* 206 Ill. 318, 68 N. E. 1087, at 1091:

"When this witness retired from the stand, appellee announced that he rested his case. Appellant's attorney then said: 'We desire to offer evidence, your honor, on the question of inspection of the cars, and so forth.' The court replied: 'Very well, I won't receive any evidence, except as to the ownership of this line, at this stage.' Exception was taken * * * Appellant, in fact, offered no evidence upon the matter. No witness was put upon the stand. No question was asked. Nothing was done, except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence * * * If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand, and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the

question, and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked."

To the same effect:

*Huggins v. Hughes,* 39 N. E. (Ind.) 298;
8 *Encyc. Plead. and Prac.* 236.

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## VI.

**IT IS THE TRIAL COURT'S DUTY TO DIRECT A VERDICT FOR DEFENDANT WHEN THERE IS NO SUBSTANTIAL EVIDENCE TENDING TO PROVE ALL OF THE MATERIAL ALLEGATIONS OF THE COMPLAINT.**

It was formerly the rule of decision that if there was a scintilla of evidence to support plaintiff's cause, the case should go to the jury, but that rule no longer obtains and the responsibility has been placed upon the trial judge to determine whether or not there is any substantial evidence produced which would sustain a judgment for plaintiff.

*Improvement & R. R. Co. v. Munson,* 14 Wall. 442, 20 L. Ed. 867, at 872:

"Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule; that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to

find a verdict for the party producing it, upon whom the *onus* of proof is imposed. *Jewell v. Parr,* 13 C. B., 916; *Toomey v. L. & B. R. R. Co.,* 3 C. B., N. S., 150; *Wheelton v. Hardesty,* 8 Ell. & Bl., 266; *Schuchardt v. Allen,* 1 Wall., 369."

To the same point we cite:

*Small Co. v. Lamborn Co.,* 267 U. S. 248, 254;
*Southern Ry. Co. v. Walters,* 284 U. S. 190, 194;
*Bowditch v. Boston,* 101 U. S. 16, 18;
*Commissioners v. Clark,* 94 U. S. 278, 24 L. Ed. 59, at 61-62;
*Davlin v. Henry Ford & Son,* 20 Fed. (2d) 317;
*Curry v. Stevenson,* 26 Fed. (2d) 534;
*Chun Quon v. Doong,* 29 Hawaii 539, at 544;
*Ellis v. Mutual Telephone Co.,* 29 Hawaii 604, at 618-619;
*Diamond v. Weyerhauser,* 178 Cal. 540, at 542.

This rule prevails even though there may be a conflict in the evidence.

*Est. of Sharon,* 179 Cal. 447, at 459:

"It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power (to direct a verdict), if there be a conflict, it must be a substantial one."

We cite this last decision because counsel on page 1 of their brief have stated that there was a conflict in Warner's testimony. The claimed conflict was in the fact that in one instance the witness had testified he was going to the steamship and later had said that before going to sea he expected to stop in Kahului

and get something to eat. We see no conflict in these statements. There can be no question that he was going to the ship—even if he did intend to get a sandwich in Kahului before going aboard.

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## VII.

**THE VERDICT WAS PROPERLY DIRECTED FOR THE UNCONTRADICTED EVIDENCE INTRODUCED BY PLAINTIFFS PROVED THAT WARNER WAS USING THE AUTOMOBILE FOR HIS OWN PURPOSES AND NOT AT ALL IN THE COURSE OF HIS EMPLOYMENT BY DEFENDANT.**

The record discloses, without conflict, that Warner, with whose alleged negligence defendant is charged in the complaint (Trans. p. 3), was chief engineer on the "Lubrico," having the usual duties of a chief engineer on a steamship (Trans. p. 73), that he went ashore about 2:30 P. M., mostly to play golf with Mr. Burns (Trans. pp. 74-75), that the chief officer told him they would be ready to sail between 9 and 11 (Trans. p. 75), that he and Captain Daniels were returning to the ship and intended to stop at Kahului and have a sandwich before going on the boat (Trans. p. 74); that they *took* the car from Mr. Burns' garage to go back to the boat (Trans. p. 70); that Warner was on no errand connected with the boat, was performing no duties for defendant (Trans. p. 74), but was on a pleasure trip (Trans. p. 75); that no one on the ship had any authority over him when he was off the ship (Trans. p. 75), and that no one gave him any orders in connection with driving the car or as to where he should go. (Trans. p. 74.)

The record further states that the accident occurred between 7:00 and 8:00 o'clock (Trans. p. 70), and that it was Warner's "duty to be on the boat in time to sail" (Trans. p. 75), which, on this occasion, meant some time between 9:00 and 11:00.

The evidence discloses a typical case of a ship officer's holiday—a round of golf, a supper on shore, a care-free half-day. This time was his own, he was free to go and come as he pleased and his only duty was to be back on the boat in time to sail. It was obviously immaterial to defendant whether he rode, flew or walked back to the vessel and he had been given no orders in that regard.

There was a total failure of proof of the vital allegations of the complaint that Warner was "driving a certain automobile *on business for defendant, and while acting within the scope of his employment.*" (Trans. p. 3.)

The cases holding that an employer cannot be held responsible under such conditions are legion; they may be found in nearly every jurisdiction. We shall cite some of the decisions in analogous cases in which either the trial Court took the case from the jury, or a judgment for plaintiff was reversed.

The general rule, supported by a very large number of decisions, is thus stated in 42 *C. J.* 1099-1101:

> "To impose liability upon the owner for the act of the driver of his motor vehicle under the law of master and servant the driver must be acting within the scope of his employment, and the use of the vehicle must have been in the service of the owner or while about the owner's business, and if

it is not being so used, it is not material whether or not its use is by the permission of the master. Liability will not in the absence of statute or personal negligence upon his part be imposed on the owner merely by the fact that his servant is driving the vehicle at the time of the accident, or that the negligence of his chauffeur occurs during the period of employment."

39 *C. J.* 1296:

"*Act committed by servant when off duty.* If the act resulting in the injury is committed by the servant at a time when he is off duty, as for instance, after the day's work is completed, or at the noon hour, or where the servant has been given a holiday, the master will not be liable therefor; and it has been held that this is so, although the act is one which, if done by the servant while on duty and at a time when actually engaged in the master's service, would be within the course and scope of his usual and ordinary duties."

In *Rose v. Balfe,* 223 N. Y. 481, the New York Court of Appeals said:

"The evidence tending to disclose liability on the part of the defendant was limited to the testimony of Drenning, that at the time of the accident he was an employee of the defendant, and driving the car owned by defendant. Such fact was prima facie evidence of the responsibility of the defendant. Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161. The presumption growing out of a prima facie case, however, continues only so long as there is no substantial evidence to the contrary. When that is

offered, the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely thereon."

Judgment for plaintiff was reversed.

In affirming a judgment of nonsuit in *Kish v. Cal. State Auto. Assn.,* 190 Cal. 246, the California Supreme Court said, at pages 248-9:

> "It is, of course, elementary that the master's liability, being predicated upon the fact of the employment, the master is not responsible for the acts of the servant while the servant is pursuing his own ends, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master. (26 Cyc. p. 1536; *Stephenson v. Southern Pacific Co.,* 93 Cal. 558 (27 Am. St. Rep. 223, 15 L. R. A. 475, 29 Pac. 234); *Brown v. Chevrolet Motor Car Co.,* 39 Cal. App. 738 (179 Pac. 697); *Berry on Automobiles,* sec. 684.) Whether or not the master is responsible for the act of the servant at the time of the injury depends, therefore, upon whether the servant was engaged at that time in the transaction of his master's business or whether he was engaged in an act which was done for his own personal convenience or accommodation and related to an end or purpose exclusively and individually his own. In other words, if the servant used the automobile of his master not in furtherance of his master's business, but for his own individual use, he is merely a borrower and the relation of master and servant not existing during the course of such use, the master is not liable for his acts. (*Gousse v. Lowe,* 41 Cal. App. 715 (183 Pac. 295).)"

In the foregoing case the employee was driving a truck furnished him by defendant for use in installation of road signs and the employees had no stated hours of employment. At the time of the accident the driver and a fellow-employee were going to get their evening meal.

In *Menton v. Patterson Merc. Co.,* 145 Minn. 310, it appeared that one of defendant's employees, with defendant's consent, used defendant's truck upon a picnic to a nearby lake resort. Upon returning, the employee ran into plaintiff's automobile. The Supreme Court sustained a directed verdict for defendant and held that the presumption of liability was overcome by the evidence that the truck was being used for "the personal convenience and pleasure of the employee."

See also:

*Doran v. Thomsen,* 71 Atl. 296 (N. J.);

*Gardner v. Farnum,* 230 Mass. 193; 119 N. E. 666;

*Johnston v. Cornelius,* 193 Mich. 115; 159 N. W. 318.

*Lane v. Ajax Rubber Co.,* 120 Atlantic (Supreme Ct., Conn.) 724:

"The court set aside the verdict because the driver of defendant's car at the time of the accident was not acting within the scope of his employment. The plaintiff's case depended upon the testimony of the driver, whom the plaintiff put on the stand, and who testified that at the time of the accident he was driving a car of defendant, which he was accustomed to use in the course of

his employment. On his cross-examination by defendant's counsel, he testified that at the time of the accident he had departed from his employment and was engaged upon his own matters, unconnected with his employment. There was no evidence in contradiction of this, and nothing whatever in the record to indicate that the witness was untrustworthy. * * *"

'No other course was open to the trial court than to set this verdict (for plaintiff) aside."

*Fallon v. Swackhamer,* 123 N. E. 737 (N. Y. Ct. of Apps.) at 738:

"An owner who gratuitously loans his car to a servant, or even to a member of his family for such person's own particular pleasure or business, is not liable for an accident thereafter happening. The person driving, whether the servant or agent as a member of the family, must at the time be engaged in the owner's business or purpose to render him liable." (Judgment for plaintiff reversed, evidence showing employee used car to take his mother—defendant's mother-in-law—from defendant's house to her own home and to give other of defendant's house-guests a ride.)

In *Babbitt v. Seattle School Dist.,* 170 Pac. (Wash.) 1020, plaintiff was injured in a collision with one Brown, an employee of defendant, while Brown was operating a motorcycle belonging to the defendant. It appeared that Brown's duty was to deliver parcels on a motorcycle, his hours of work being from 8:00 until 5:00, and it further appeared that there was a rule of the defendant that no motor vehicle should be used

for any other purpose than business purposes. On the day of the accident Brown quit work at five o'clock and started to go home on the motorcycle without the permission of anyone to use it, taking it for the purpose of saving carfare. This evidence was uncontradicted. The plaintiff claimed that the jury should not be bound by the testimony of Brown but the Court held that although he was an employee of the defendant he was not a party to the suit, was in no way interested in the outcome, his testimony was unimpeached and uncontradicted to the effect that he was using the motorcycle for his own convenience and therefore it appeared from the uncontradicted evidence that defendant was not liable. In considering the presumption of liability of the employer based upon ownership of the instrumentality causing the injury as well as the question of liability for the act of the servant while engaged in business for his employer the Court says on page 1022:

> "The presumption, growing out of a prima facie case established by proof of the injury and the ownership of the motorcycle and the use thereof by an employee of the owner of the motorcycle, subsisted only so long as there was no substantial evidence to the contrary. When that was offered, the presumption disappeared, unless met by further proof. Here the presumption arising from the fact of ownership was entirely destroyed by the other evidence. (Citing cases.)
>
> Upon the undisputed and competent evidence as to the motorcycle being in Brown's possession at the time of the accident without authority and of his not being at the time acting in the scope

of his employment in any capacity, reasonable minds could not differ, and there was no evidence or inference from evidence upon which the jury was justified in holding appellant liable."

It is respectfully submitted that the case at bar falls squarely within this language.

In *Hall v. Puente Oil Co.,* 47 Cal. App. 611, Roberts was a travelling salesman whom defendant permitted to use its car for personal purposes after working hours and on holidays. The accident occurred after working hours. The Court said:

"Respondent lays much stress upon the fact that the use of the car by Roberts for his own purposes was with the consent of the Puente Oil Company, his employer. At most, this was a mere lending of the car to him for his own use, as to which, says the court in Brown v. Chevrolet Motor Co., supra, 'it is uniformly held that the owner is not responsible for injuries resulting from the negligence of a driver whose only relation to the owner is that of borrower,' in support of which the court cites Berry on Automobiles, Sec. 684, Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81, and Segler v. Callister, 167 Cal. 377, 139 Pac. 819, 51 L. R. A. (N. S.) 772. *We are unable to draw any distinction between a case where the use of the car by a servant for his own purpose is without the master's consent and that where such use is permissive. Carried to its logical conclusion, the contention of respondent, which was adopted by the trial court, would render the owner of a shotgun liable for the act of one to whom he had loaned it for use on a hunting trip and due to whose negligent use*

*thereof he had shot another. Our conclusion, therefore, is that the findings of which appellants complain are not supported by the evidence.*" (Italics ours.)

*Nussbaum v. Traung Co.*, 46 Cal. App. 561:

"If the rule be extended to hold the master liable for the negligent acts of a servant while on his way to report for duty in the morning, the master would also be liable for the negligent acts of the servant while preparing his dinner pail before leaving his home, because he is then preparing or in a sense on his way to report for duty; and also the master under such a rule would be liable for the negligent act of a servant from the time he arose from his bed in the morning in preparation to report for his day's duties. The statement of such a rule reduces it to an absurdity."

See also:

*Whiteoak Coal Co. v. Rivoux*, 102 N. E. (Ohio) 302;

*Mauchle v. Panama Pac. Exp. Co.*, 37 Cal. App. 715;

*Lucas v. Friedman*, 24 Fed. (2d) 271 (C. A., D. C.).

Counsel in their argument overlooked the fact that where a servant is off on a holiday he does not again act in the course of his employment until he has resumed his duties as employeee.

*Gousse v. Lowe*, 41 Cal. App. 715 at 719:

"In a very few cases in other states when the tort occurred on the homeward journey of the dis-

obedient servant the master has been held liable, but the great current of authority, in this country and in England, is against those isolated cases. (*Danforth v. Fisher,* 75 N. H. 111 (139 Am. St. Rep. 670, 21 L. R. A. (N. S.) 93, 71 Atl. 535); *Colwell v. Aetna etc. Co.,* 33 R. I. 531 (82 Atl. 388); *Reynolds v. Buck,* 127 Iowa, 601 (103 N. W. 946); *Riley v. Roach,* 168 Mich. 294 (37 L. R. A. (N. S.) 834, 134 N. W. 14); *Ludberg v. Barghoorn,* 73 Wash. 476 (131 Pac. 1165); *Chicago etc. Ry. Co. v. Bryant,* 65 Fed. 969 (13 C. C. A. 249); *St. Louis Ry. Co. v. Harvey,* 144 Fed. 806 (75 C. C. A. 536); *Hartnett v. Gryzmish,* 218 Mass. 258 (105 N. E. 988); *Solomon v. Commonwealth Trust Co.,* 256 Pa. St. 55 (100 Atl. 534); *Mitchell v. Crassweller,* 13 Com. B. 237; *Storey v. Ashton,* L. R. 4 Q. B. 476.) They cannot be supported upon any sound reason. If the servant takes his master's machine for a junketing or a business trip of his own, the trip is not complete when he reaches a point miles away from the place where the machine ought to be. *The servant is upon his own trip until his return to the point of departure, or to a point where in the performance of his duty he should be.*" (Italics ours. Hearing denied by Supreme Court.)

The record in our case discloses, without contradiction, that Mr. Warner's duties were on board ship and that his only duty upon the night in question was to be on the vessel in time to sail.

Appellants' contention is that the mere ownership of the car by defendant and the fact of its being driven by the chief engineer of one of its vessels necessitates the case being submitted to the jury. In

most of the cases above cited the car was owned by the defendant and operated by defendant's employee.

The weakness of appellants' contention lies in the fact that whatever inference arose from those facts disappeared when they introduced the testimony showing without contradiction that Warner was off on a holiday and was not driving "on business for defendant" or "while acting within the scope of his employment," as charged in the complaint.

Counsel evolve a new theory of automobile law and apparently seek to remove automobile cases from the doctrine of *respondeat superior*. Nevertheless, that doctrine controls in all cases where the owner is not personally operating the car, with three exceptions: first (in some jurisdictions), where the car is provided for family use; second, where *by statute* the owner is held responsible for permissive use, though not about his business; and, third, where the car is permitted to be used by a known incompetent or reckless driver. The case at bar does not fall within any of these exceptions.

Counsel seek to bring Warner within the class of one acting in the course of his employment by contending that the use of defendant's automobile shortened Warner's time off and lengthened the time of his employment. There are several obvious answers to that contention.

First, the Court will not assume that defendant's automobile would convey him more rapidly than one hired from a third person. Counsel, upon his motion to reopen, admitted that he did not propose to show

that there were no other ways of getting to the boat—but merely that use of defendant's car was a reasonable way. (Trans. p. 78.) It might easily be inferred that a local driver, being familiar with the road, could have shortened the driving time.

Second, counsel assume that it was Warner's duty to be on the boat from two to four hours ahead of sailing time, whereas the testimony is that it was his duty to be on the boat "in time to sail." (Trans. p. 75.) There was absolutely no evidence that he had any idea of lengthening his time of employment. We venture the suggestion that he would have gone by automobile, whether hired, borrowed or donated, so that the use of *defendant's* machine is a false quantity.

Third, Warner was going to stop in Kahului to eat. Using defendant's car might have shortened, or lengthened, his eating time—dependent upon whether it or another car would have made the better time—but whether it would have done so, or would have affected in any way his time of employment on the boat, is purely speculative.

We call particular attention to the total failure of proof. The theory of plaintiffs' case—and the cause of action relied upon—as set forth in the complaint was strictly that of *respondeat superior*. Eliminating non-essential words, the complaint charged:

> "That on June 16, 1930, one Reginald C. Warner was an employee or agent of said defendant" and he "while driving a certain automobile *on business for defendant, and while acting within the scope of his employment*" negligently collided with Felix Angco.

*There was a total failure of proof of the quoted allegations.*

With this theory of plaintiffs' case clearly set forth in their complaint, they come into this Court with a new theory and say that in the "new law of automobiles the emphasis has been shifted from the *agent* to the *agency.*" (Brief, p. 4.) We submit that the law has never changed, but counsel are seeking to shift from the cause of action set forth in their complaint to a new theory of their own which finds no support in texts or decisions, except in the one or two jurisdictions where an automobile is held to be a "dangerous instrument."

On page 4 they enlighten us with an abridged bibliography of automobile law—but they do not quote a sentence from any of these texts to support their new theory.

One of the texts most often cited is *Huddy* on *"Automobiles,"* and we quote from the 8th edition of that work, Sec. 747:

> "The general rule is, that in an action against the owner of a motor vehicle for injuries occasioned by the negligence of the driver thereof, the owner is not liable merely because the driver is in the general employ of the owner. To charge the owner, it must also appear that the driver at the time of the accident in question was acting within the scope of his master's business.
>
> When the owner of an automobile is sued for damages on account of an injury caused by the machine while driven by his chauffeur, the rules of law touching master and servant and the lia-

> bility of the former for the acts of the latter, are to be applied. A *prima facie* case which will hold the owner, unless counter evidence is produced, may sometimes be created on proof of the ownership of the machine and general employment of the chauffeur, but such *prima facie* case will be dispelled on proof that the servant at the time was not acting within his employment."

To the same effect are:

*Berry* on *"Automobiles"* (6th Ed.), Sec. 1315;
*Babbitt* on *"Motor Vehicles"* (3rd Ed.), Sec. 1207.

The doctrine of *respondeat superior* is just as applicable to automobile negligence cases as it is to other branches of negligence law—which counsel clearly recognized when they set forth their cause of action in the complaint.

Counsel seem to rest their case very largely on the decisions in *d'Aleria v. Shirey,* 286 Fed. 523; *Stuart v. Doyle,* 112 Atl. 653; *Silent Automatic Sales Corp. v. Stayton,* 45 Fed. (2d) 471, and *Anderson v. Southern Cotton Oil Co.,* 74 So. (Fla.) 975. To comment upon all of appellants' citations would make this brief interminable and we shall content ourselves with analyzing the decisions upon which they place their chief reliance.

In *d'Aleria v. Shirey,* the decision was founded upon the fact that defendant's car was delivered to the driver for use in defendant's business, namely, to return it to the garage and, possibly, to go to a music store, and that mere "deviation of a few blocks for

ends of his own'' did not take the case out of the doctrine of *respondeat superior.*

Also, the defendant and the driver differed as to the instructions given him when the automobile was placed in his charge.

Furthermore, the testimony to rebut the inference was not produced—and therefore vouched for—by plaintiff as was done in the case at bar.

In *Stuart v. Doyle* the driver was not engaged in a personal venture of his own, as was Warner on his holiday at Paia; O'Neill, the driver, was engaged in his employer's business. It was the custom of the farm laborers to telephone O'Neill on their arrival at South Windsor and it was O'Neill's duty to see that they were taken to defendant's farm. To be sure, it was not in the regular line of O'Neill's duties to transport the laborers but he was unable to reach the defendant by phone to arrange for their transportation and was confronted with an emergency. The Court commented upon this when it spoke of ''the circumstances under which it was done''.

The Court also stated that the evidence was ''ambiguous in its nature'', whereas in our case there was no ambiguity and no question as to the nature of Warner's jaunt to Paia and return.

In *Silent Automatic Sales Corp. v. Stayton,* Dittmar and other of defendant's employees had been sent out on a job and on completion of installation were being taken home in defendant's truck *which was regularly stored over night in Dittmar's yard.* The quotation of excerpts from the opinion will demon-

strate the difference between that case and ours. We quote:

> "Curry v. Stevenson, 58 App. D. C. 162, 26 F. (2d) 534, recognizes the presumption, but holds that it may be overcome by uncontradicted proof to the contrary; that, in such case, the question is one for the court and not for the jury.
>
> It is felt to be unnecessary to multiply cases that may be adduced upon the lines indicated in the foregoing citations. The obvious rule deducible therefrom is that the presumption created vanishes, if at all, only when rebutted by uncontradicted proofs. That, in such case, the question is one for the court, and it would follow, we think, that the court would take the matter from the jury only upon the well known principle that the evidence in a given case is so clear that reasonable men cannot differ as to the verdict which ought to be rendered."

We are not surprised at the citation of *Anderson v. Southern Cotton Oil Co.,* in view of appellants' new theory of the law of automobiles, but suffice it to say that Florida is in a hopeless minority in holding that an automobile, in operation, is a "dangerous instrument"—which is the basis of the *Anderson* decision.

The Court will find that all of the cases cited by counsel on pages 19 to 23 of their brief are readily distinguishable upon their facts from our case.

For example, in *Ackerson v. Jennings,* 140 Atl. 760, the Court held (p. 762) that the banquet was "intended principally, if not solely, to promote legitimate and important interests of the defendant's business".

In *Good v. Berrie,* 123 Me. 266, the Court said (p. 631) that the driver, a roving phonograph salesman, "was apparently on the way to the home of Mr. Hoyt, with whom he had left a phonograph for trial".

In *City of Ardmore v. Hill,* 293 Pac. 554, the Court said (p. 555) that it might logically be inferred that the driver was using the car "for the purpose of having it with him, for use in case of an emergency call to duty".

In *DiMarco v. The Company,* 220 Ill. App. 354, the "separate business", mentioned by counsel, was found by the Court to be a subsidiary of defendant, its employees subject to the orders of defendant's manager and superintendent, and that there was "other evidence justifying the finding".

In *Mullins v. Richie Grocery Co.,* 35 S. W. (2d) 1010, there was conflicting evidence as to whether or not the employee was engaged in defendant's business (attempting to make collection of accounts) and, accordingly, sent the case to the jury.

In some of the other cases the drivers were automobile salesmen, with authority to sell cars at any time and place when they could find a purchaser and it was held that there was evidence tending to show they were acting in course of employment.

It will serve no useful purpose to lengthen this brief with a further discussion of appellants' citations. In none of them did a situation exist which was analogous to ours.

## VIII.

**PLAINTIFFS DID NOT STAND UPON AN INFERENCE OR A PRESUMPTION BUT PRODUCED MR. WARNER AS THEIR WITNESS TO PROVE THE FACTS AND ARE BOUND BY HIS TESTIMONY.**

Counsel charge that Mr. Warner was a "hostile, evasive and unwilling witness"—and there counsel ran out of adjectives. They do not say that he was untruthful or that there was even a hint of improbability in his testimony. If he had been a purser instead of a chief engineer they would probably accuse him of perjury and claim that he had business to transact for defendant in Paia, but it would be too strong a strain on one's credulity to suggest that a chief engineer on a vessel would have business inland.

We submit that there is no evidence before the Court to sustain the charges made against Warner's character as a witness. As a matter of fact, appellants' "Statement of Evidence" does not even disclose that Warner was employed by defendant at the time of the trial of this case.

The testimony of Mr. Warner is wholly reasonable and probable—in fact one could hardly conjure up any reason for his going inland to Paia except upon a pleasure jaunt.

Plaintiffs produced him as a witness and, therefore, vouched for his credibility. They did not claim to be surprised by his testimony or seek either to rebut it or to impeach him as a witness.

His testimony, offered as part of plaintiffs' case, put them out of Court. As was said in *Kish v. Cal. State Auto. Ass'n.*, supra, at page 251:

> "If the same testimony which proved the relationship of master and servant proved that at the time of the act for which it is claimed the master was liable, the servant was not acting within the scope of and in the course of his employment, the *prima facie* case made by plaintiff is rebutted by the very proof offered to prove the first fact. It is not necessary, therefore, for the defendant to negate the master's liability, inasmuch as the plaintiff has done so herself. The proof at that stage lacks an essential element to support plaintiff's cause of action and an order granting a nonsuit is, therefore, proper."

In *Brown v. Chevrolet Motor Co.,* 39 Cal. App. 738, the plaintiff called as his witness the manager of defendant corporation who testified on direct examination that defendant owned the automobile causing plaintiff's injury and that West, who was driving it, was an employee of defendant. Upon cross-examination the manager testified that West had asked for and been granted permission to use the car to take his family out for a ride.

In affirming a judgment of nonsuit, the Appellate Court said:

> "Evidence elicited on cross-examination is regarded as testimony on the part of the party calling the witness, and not as evidence of the party cross-examining. Upon the determination of a motion for a nonsuit, all of the evidence produced on behalf of the plaintiff, both on direct and cross-examination, must be considered. Taking all this evidence into consideration, it appeared, without conflict, that, at the time of the

> accident, the automobile was being used by West solely in a pleasure excursion, for which purpose it had been borrowed by him from the defendant company." (Hearing denied by Supreme Court.)

The Court will note the striking analogy between the situation in the above case and ours so far as the production of the evidence is concerned.

In reversing a judgment against the owner in *Martinelli v. Bond,* 42 Cal. App. 209 at 212-213, the Appellate Court said:

> "It is further contended by respondent that he made a *prima facie* case against appellant by proof of the latter's ownership of the automobile, and the fact that the driver, Noonan, was his employee at the time of the accident. The presumption arising from such *prima facie* case remained only so long as there was no substantial evidence to the contrary. When the fact is proven to the contrary without contradiction, no conflict of evidence arises, but the presumption is simply overcome. (*Maupin v. Solomon, supra; Brown v. Chevrolet Motor Co. of Cal., supra.*) In this case there is no conflict in the evidence as to the fact that, at the time of the accident, the automobile was in use by the employee for his personal pleasure. Uncontradicted proof of that fact dispelled the presumption of liability on the part of the owner." (Hearing denied by Supreme Court.)

In the above case the employee—*who was a co-defendant*—testified that the trip was made "for the purpose of taking an outing" and that "it was not being used for any purpose connected with the busi-

ness of Mr. Bond." This testimony was held to destroy the presumption or inference.

In many of the decisions, and in counsel's argument in this case, the word "presumption" is frequently used when, as a matter of law, there is *no presumption* but only an *inference* arising from the proof of ownership and of employment of the driver.

This distinction was clearly pointed out by the Supreme Court of California in denying a hearing in *Maupin v. Solomon,* 41 Cal. App. 323, which was an automobile case involving the question of the employer's responsibility. We quote the Supreme Court's opinion (p. 326):

> "In denying the petition for hearing in this court after decision by the district court of appeal of the first appellate district, division one, we desire to point out that respondent's *prima facie* case was based solely on an 'inference,' and not on any 'presumption' declared by law. When we say that a certain inference is warranted by certain facts proved, we mean no more than that the jury is reasonably warranted in making that deduction from those facts. (Code Civ. Proc., sec. 1958.) In this case the direct uncontradicted evidence introduced in response to the *prima facie* case as to the circumstances under which the employee of appellant was driving appellant's automobile was of such a nature as to leave no reasonable ground for an inference based solely on the fact of appellant's ownership of the automobile and the further fact that the person driving was an employee of appellant, that the driver was acting within the scope of his employment at the time of the accident. The verdict, there-

fore, was contrary to the evidence, and this is all we understand the opinion of the district court of appeal to decide."

In *Pemberton v. Morris Fertilizer Co.,* 287 Fed. 517 (C. C. A., 5th), the Court of Appeals sustained a directed verdict for defendant, based upon the testimony of its employee, who was driving the car.

Even in jurisdictions where statutes permit parties to call their adversaries without making them their own witnesses, the testimony so elicited is binding unless overcome by other testimony.

*Dravo v. Fabel,* 132 U. S. 487; 33 L. ed. 421 at 422:

"So that, when the plaintiffs used the depositions of Dippold and Fabel (the principal defendants), taken 'as under cross-examination', they made those parties their own witnesses. While the plaintiffs were not concluded by their evidence, and might show they were mistaken, it could not be properly contended by the plaintiffs that they were unworthy of credit."

In other words, the Supreme Court holds, as do the other Courts, that such testimony is binding upon plaintiffs the same as any other evidence introduced by them, unless they have contradicted or rebutted it by other testimony.

*Aphoresmenos v. McIntosh,* 189 Mich. 680 at 683:

"Plaintiff called defendant for cross-examination under Act No. 307, Pub. Acts 1909. After

giving testimony at length upon the material phases of the case, which testimony was not afterward contradicted, counsel assert that the plaintiff is not bound by it. *Testimony developed in this manner may be contradicted and overcome by other testimony, but its effect cannot be destroyed or put aside by mere assertion.*" (Italics ours.)

*Krewson v. Sawyer,* 109 Atl. (Pa.) 798 at 799:

"Defendant, who was called by plaintiff as under cross-examination, testified that the account up to January 1, 1913, had been *approved by plaintiff's decedent,* and vouched each of the items in the supplemental account attached to the affidavit of defense, with only a few slight changes in amount * * * *Neither plaintiff's other evidence nor that produced by defendant in any manner qualified the testimony above outlined, which must, therefore, be taken as true.* Dunmore v. Padden, 262 Pa. 436, 105 Atl. 559." (Italics ours.)

See also to the same effect:

*Leystrom v. City of Ada,* 110 Minn. 340 at 343;

*Swank v. Croff,* 245 Mich. 657 at 658;

*Morningstar v. Northeast Pa. R. Co.,* 137 Atl. 800 (Pa., 1927).

If the testimony of a party, called by his adversary, must when uncontradicted, and not in itself improbable, be given full credence, then, obviously, the testimony of Mr. Warner, who was not a party or shown by the record to be interested in the outcome, must be accepted as true and binding upon plaintiffs.

The Federal Courts hold that where witnesses testify unequivocally and without contradiction their testimony must be accepted as true.

*Choctaw & M. R. Co. v. Newton,* 140 Fed. (C. C. A., 8th) 225 at 250:

"To make out a case they placed these engineers (engineers for Choctaw & M. R. Co.) on the witness stand, who testified at great length; and appellees invoke much of their testimony when it suits their purpose. No rule of evidence is better settled than that a party cannot impeach his own witness. Courts of high authority have said that a party thus using a witness may not then purposely contradict him, as he may not approbate and then reprobate. While it may be conceded that the rule does not preclude the party from showing, by other witnesses, facts inconsistent with those testified to by the witness thus introduced by him, nor from insisting before the court or jury that they should consider all the evidence and adopt that of one or the other witnesses, yet, such a party cannot impugn the integrity of the witness he has so introduced, and upon whose testimony he relies in part. He 'cannot be permitted by argument to say that the witness is unworthy of belief, or to destroy the effect of his testimony by argument which assumes that the witness is dishonest.' Ashley v. Board, etc., 83 Fed. 534, 27 C. C. A. 589; Graves v. Davenport (D. C.), 50 Fed. 881; United States v. Budd, 144 U. S. 172, 12 Sup. Ct. 575, 36 L. Ed. 384." (Certiorari denied by the Supreme Court in this case.)

*Standard Water Systems Co. v. Griscom Russell Co.,* 278 Fed. (C. C. A., 3d) 703 at 705:

"There is a case somewhat analogous to the case at bar, so far as the calling of a defendant as a witness for a plaintiff is concerned, to be found in Coonrod v. Kelly (in this Circuit), 119 Fed. 841, 56 C. C. A. 353. There the bill did not waive answer under oath by the defendants, and the answers to the bill and to the interrogatories therein propounded were responsive, and were in general tenor and effect the same as testimony given by two of the defendants when called by the complainant. As Judge Gray puts it (119 Fed. at the bottom of page 846, 56 C. C. A. 358), alluding to the testimony of the defendants who had been called by the plaintiff:

'By this testimony he is bound, unless he can, by other witnesses and evidence, direct or circumstantial, show that their testimony is false. A complainant, who places the defendant on the stand, is not bound to refrain from contradicting him, where the exigency of the case demands it. In the case before us, however, there has been no testimony adduced to contradict that of Booth and Howlett. Whatever of improbability or suspicion may attend it, owing to the peculiar facts or circumstances of the case, it is not sufficient to countervail the effect of the direct testimony brought out by complainant from the defendants whom he called upon to testify.'

In the instant case, no facts or circumstances, of which evidence was offered, are sufficient to countervail the direct testimony brought out by the complainant from the two defendants whom it called upon to testify." (Certiorari denied by Supreme Court.)

*Wirfs v. D. W. Bosley Co.,* 20 Fed. (2d) 632 at 633:

"A complainant who calls a defendant as a witness is bound by his testimony, unless he can by witnesses or other competent evidence show that his testimony is false."

*Coonrod v. Kelly,* 119 Fed. (C. C. A., 3rd) 841 at 846-7:

"Undoubtedly, the burden was upon the complainant, Coonrod, to establish to the satisfaction of the court one or both of these averments of his bill. This he has been unable to do. He has been compelled to rely upon the testimony of Booth and Howlett, the mortgagor and mortgagee, made defendants by the bill. By this testimony he is bound, unless he can, by other witnesses and evidence, direct or circumstantial, show that their testimony is false. A complainant, who places the defendant on the stand, is not bound to refrain from contradicting him, where the exigency of the case demands it. In the case before us, however, there has been no testimony adduced to contradict that of Booth and Howlett. Whatever of improbability or suspicion may attend it, owing to the peculiar facts or circumstances of the case, it is not sufficient to countervail the effect of the direct testimony brought out by complainant from the defendants whom he called upon to testify."

See also:

*Gunther v. Ins. Co.,* 134 U. S. 110;

*Delaware R. Co. v. Converse,* 139 U. S. 469;

*Four Packages v. U. S.,* 97 U. S. 404;

*Potts v. Pardee,* 220 N. Y. 431; 116 N. E. 78.

## IX.

### APPELLANTS' VIOLATION OF RULE 24 OF THIS COURT AND INSUFFICIENT ASSIGNMENTS OF ERROR.

We mention this point primarily to secure a ruling which may act as a guide in the future to members of the bar of this Circuit. There has been no attempt made by appellants to comply with the rule requiring a specification of the errors relied upon and there is no reference anywhere in the brief to any assignment of error. This may, or may not, be due to the fact that some, if not all, of the assignments of error are insufficient under the decisions. We shall now comment upon all of the assignments.

For example, the first assignment (Trans. p. 44) is too general and indefinite, being merely a statement that the judgment is contrary to the law and the evidence.

*Hecht v. Alfaro* (C. C. A., 9th), 10 Fed. (2d) 464, 466;

*Lawson v. U. S.* (C. C. A., 8th), 297 Fed. 418.

The second assignment (Trans. p. 45) is not only argumentative, but it cannot be determined therefrom whether the assignment is directed toward the refusal of an instruction requested by plaintiffs or the giving of the instruction directing a verdict for defendant.

The third, fourth and fifth assignments of error (Trans. pp. 45 and 46), are apparently based upon the opinion of the Supreme Court of Hawaii and such assignments are not available because the opinion forms no part of the record and has no binding effect upon this Court.

As was said by Judge Morrow in *Mutual R. F. Life Ass'n. v. DuBois* (C. C. A., 9th), 85 Fed. 586 at 589:

> "The insufficiency of the record in the present case is still further disclosed in the assignments of error, which are directed mainly to the opinion of the court, and cannot be considered, since the opinion of the court is no part of the record; and the only exception in the record is to the decision of the court 'upon the grounds that it was against law, and against the weight of the testimony in the cause, and not warranted by the testimony of the cause.' As the record does not present any question to this court for determination, the judgment of the circuit court is affirmed."

*Stoffregen v. Moore* (C. C. A., 8th), 271 Fed. 680 at 681:

> "These two assignments of error present nothing for review: First, because they are based upon the opinion of the court, which cannot be the basis of an assignment of error. The opinion may be wrong, and still the judgment be right."

If this case were pending in the Eighth Circuit, there is no question that the Court would dismiss the appeal or affirm the judgment for failure to set out a specification of errors in the brief as required by Rule 24.

*City of Lincoln v. Sun Vapor Street Light Co.* (C. C. A., 8th), 59 Fed. 756, is the leading case in that Circuit and it has been followed consistently. It was cited with approval in the Ninth Circuit in *Walton v. Wild Goose M. & T. Co.,* 123 Fed. 209. The most

recent cases are *Harlow Taylor Butter Co. v. Crooks,* 41 Fed. (2d) 627, and *Hard & Rand v. Bristol Coffee Co.,* 41 Fed. (2d) 625.

The failure of appellants to comply with the rules, in our case, has added greatly to our labors in preparing this brief and, we believe, will make the Court's task more arduous than it should be. We would appreciate a ruling as to whether or not Rule 24 is to be enforced in this Circuit.

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## X.

### CONCLUSION.

Under the uncontradicted evidence in the record before this Court, there can be no question that Warner was upon a personal holiday and was not at all engaged in defendant's business. Appellants have gone far afield from the record in attempting to prove otherwise.

We have called attention heretofore to some of the appellants' statements finding no support in the record and we feel it to be our duty to the Court to direct attention to others before closing this brief.

The following entire statement (Brief, p. 2) is "drawn from thin air":

> "For example, the plaintiffs were and are ready to prove in that connection,
>
> (a) that earlier on the day of the accident, Burns had transported the Captain to The Company Office so that the Captain could make his report there, and

(b) that Burns, testifying before the Coroner's jury prior to the trial of Warner on a manslaughter charge, said, in reply to a question put by Mr. A. E. Jenkins, Counsel for Aetna Insurance Company, about the use of the Company car by Warner:

'Being Company Employees they took the car. A car assigned to a driver must be driven by himself, Company rules, unless we authorize someone else to drive it.' ''

The so-called "offer of proof" does not contain any of the matters above-mentioned and, as officers of this Court, we state that Aetna Insurance Company is not interested in this case, directly or indirectly. Another reference to the Aetna Insurance Company will be found on page 24. We might conclude, from these statements, that counsel think they are pleading their case before a jury.

Upon page 10 counsel state that the trial judge refused an offer of proof "on the short ground that even if he received the evidence offered, it would not change his ruling against them." The record contains no such statement from the Court and this Court, in considering the trial Court's denial of the motion to reopen, will note that it may be supported upon the ground that plaintiffs made no showing excusing the failure to offer the proof before the testimony had been closed and before Mr. Burns had returned from Honolulu to the Island of Maui.

On page 13 counsel state that plaintiffs were not in possession, at the time of trial, of the transcript of Mr. Warner's testimony. This may be correct but

the record does not so state, and on page 79 of the transcript appears a statement by appellants' counsel as follows:

> "We have a record of the testimony, so far as the lending of the car is concerned, taken at the other trials, and so far as his duties are concerned, we can call another officer of the Standard Oil Company."

On page 14 counsel state:

> "Warner was due back on the boat at 7:30 or earlier, for the reason that he had duties to perform thereon pursuant to his employment as Chief Engineer of the boat."

On page 15 is the following:

> "It was his duty to return by at least 7:30, and superintend, as Chief Engineer, the preparation of the boat for sailing."

There is nothing in the record to support these statements. Counsel attempt to put something into Mr. Warner's testimony that can not be found in it. The record shows that it was his duty to be on the boat in time to sail and that the sailing time was between 9:00 and 11:00 P. M., and there is no evidence that he had anything to do to prepare the boat for sailing, or that a chief engineer ever has such duty.

Here is another figment of counsel's imagination:

> "Warner was certainly not vouched for by plaintiffs. He had every reason to color his testimony. *He made it clear that the retention of his job depended on the outcome of the litigation.*" (Brief, p. 15.)

Such statement is the sort that has been criticized by the Courts, as we have shown in this brief, where counsel seeks to impugn the integrity of a person whom he has called as a witness.

The same sort of statement is found at the top of page 17 of the brief.

Again on page 15:

> "The accident occurred at *eight o'clock, when he should have been on the boat performing those duties* * * * while he was traveling in a Company car *whose use was authorized by the General Manager* * * *."

The italicized statements are unsupported by the record.

On page 18 is this:

> "Where the men were *before the situation became acute* at Burns' house in Paia, is entirely immaterial."

This statement savors of an attempt to mislead. There is nothing in the record to even suggest that a situation became acute, and counsel's statements when he was endeavoring to have the case reopened deny the possibility of it. He said (Trans. p. 78), that it was 6:30 in the evening, the boat was leaving between 9 and 10 or 11 o'clock, that it was approximately five miles to the boat and that he did not propose to show that there were no other ways of reaching it, but that he did suggest that taking defendant's car was a reasonable way.

In the "Conclusion" of their brief counsel let their enthusiasm completely dominate them and toss the record into the waste-basket. They say that Burns' duties were "naturally very broad," that he undertook the transportation of the men to the boat, that Warner was due back about 7:30, that it was 8:00 when the accident happened, that the car was furnished by defendant to Burns "for just such a purpose" and that it was his duty to expedite the passage of the defendant's boats. Then they increase the distance to Paia to 10 miles.

None of the things mentioned in the last paragraph hereof is sustained by the record.

It is not a pleasant task for an attorney to call attention to stretching of the record. We would prefer to agree that a fair statement had been made. It would have made it easier for both the Court and ourselves had this been done in this case.

In conclusion, may we say that, when the Court has read the appellants' "Statement of Evidence," as it appears in the transcript, it will be found that it contains nothing to sustain the allegations of plaintiffs' complaint that Mr. Warner was "driving a certain automobile on business for defendant, and while acting within the scope of his employment." On the contrary, the record proves, without contradiction, by testimony produced by plaintiffs, that he was on shore leave for a golf game and was neither under the control of defendant nor doing anything in its

business or in connection with his employment as chief engineer of a vessel.

The judgment should be affirmed.

Dated, San Francisco,
January 18, 1933.

Respectfully submitted,
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